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2012 JAN 20 PM 2:15 ✓
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF YAVAPAI, STATE OF ARIZONA

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300 CR2010-01325

**REPLY REGARDING MOTION TO
QUASH SUBPOENA**

(Oral Argument/Evidentiary Hearing
Requested)

James DeMocker, by and through counsel undersigned, hereby replies to the State's Response to Motion to Quash Subpoena of Witness James DeMocker. This Reply is based upon the entire record before the Court, as well as upon the attached Memorandum of Points and Authorities.

DATED this 18 day of January, 2012.

ASPEY, WATKINS & DIESEL, P.L.L.C.

By


Bruce S. Griffen
Attorneys for Defendant

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. STATE'S RESPONSE TO MOTION TO QUASH SUBPOENA**

3 In its Response to James DeMocker's Motion to Quash Subpoena, the State
4 raises four points in opposition of the Motion. Those four points are:
5

- 6 1. The subpoena was properly issued by the County Attorney.
7
8 2. James DeMocker is not cooperative.
9
10 3. An objection to the subpoena must have been made within 14 days of
11 service.
12 4. Arizona has personal jurisdiction over James DeMocker.

13 James DeMocker addresses each of these points below.

14 **A. The Subpoena was not Properly Issued by the County Attorney.**

15 The State cites the rule on issuance of subpoenas under A.R.S. § 13-
16 4071(A)(2). There is no A.R.S. § 13-4071(A)(2), but A.R.S. § 13-4071(B)(2) allows a
17 county attorney to sign and issue a subpoena for a witness to appear before the grand
18 jury or to appear before the court in which the case is to be heard. Under this statute,
19 the County Attorney could subpoena James DeMocker to appear either before the
20 grand jury or in court, and to bring with him specific documents when he appears.
21

22 The State has not subpoenaed James DeMocker to appear before the grand jury,
23 nor to appear in court. Rather, the County Attorney has ordered him to produce
24 voluminous documents that the State wants to examine for investigation of James
25 DeMocker's brother, and possibly for investigation of James DeMocker himself. This
26

1 type of order is not one allowable under the rule, and James DeMocker cannot be
2 subpoenaed to produce evidence in the way that the State has subpoenaed him.

3
4 The State cited *Marston's Inc. v. Strand* to assert authority for a subpoena duces
5 tecum. 114 Ariz. 206, 263, 560 P.2d 778, 781 (1977). This is a case in which the
6 county attorney issued a subpoena for witnesses to appear before the grand jury with
7 specified corporate documents, for review of those documents by the grand jury. *Id.*
8 Authority for this type of subpoena is specifically outlined in the statute, as described
9 above. A.R.S. § 13-4071(B)(2).
10

11 The type of subpoena issued in *Strand* is clearly different from that which the
12 County Attorney issued to James DeMocker. James DeMocker was not ordered to
13 appear before the grand jury with specified documents, nor was he ordered to appear at
14 trial with the specified documents. He was ordered to produce the documents for
15 examination solely by the County Attorney, and the County Attorney does not have
16 the authority to so order.
17

18 Additionally, in *Strand*, the court noted that there was no showing of any
19 oppression caused by the production of the documents, and also that none of the
20 documents that the witnesses were subpoenaed to produce for the grand jury violated
21 any of those witnesses' constitutional rights. *Marston's, Inc. v. Strand*, 114 Ariz. at
22 265-266, 560 P.2d at 783 - 784 (1977). This is not true for the order made to James
23 Democker, as he argued in his Motion that the County Attorney's request is oppressive
24 and raised the issue of protection under the 5th Amendment to the U.S. Constitution.
25
26

B. The State has not Proven that James DeMocker is Not Cooperative.

The State argues that Jim DeMocker is not co-operative by citing Jim DeMocker's statement that he would not destroy any documents "if he still has them," the fact that James DeMocker lives in Virginia, his cancellation of the December 21, 2011 interview, and the several conversations between counsel for Jim DeMocker and the State. This is not sufficient evidence that James DeMocker is not co-operative for this Court to order his deposition under Ariz. R. Crim. P. 15.3.

A witness is uncooperative within the meaning of Rule 15.3 when the witness attaches such conditions to an interview that "it makes the situation untenable for [] counsel to discover needed material." *Arcaris v. Superior Court In and For County of Maricopa*, 160 Ariz. 533, 534, 774 P.2d 837, 838 (App. 1989) (quoting *Kirkendall v. Fisher*, 27 Ariz.App. 210, 212, 553 P.2d 243, 245 (1976) (the court found the insistence of three undercover narcotic agents to be deposed as a group rather than individually was to be "uncooperative" within the meaning of the rule)). The State has not met this standard for showing that Jim DeMocker is uncooperative, and has not shown that it is unable to discover needed material due to the difficulties in scheduling Jim DeMocker's interview/deposition.

C. James DeMocker's Objections are Timely, since the Subpoena was not Properly Issued or Served.

The State cites Rule 459(c)(5) to argue that James DeMocker's objections to the scope of the subpoena are not timely. Likely the State meant to cite Ariz. R. Civ. P. 45(c)(5)(ii), which states that an objection to a subpoena must be served upon the party

1 ordering the subpoena within 14 days of service of the subpoena or before the time
2 specified for compliance.

3
4 Though James DeMocker does not need to assert timely objections to the
5 invalid subpoena, his objections are not untimely for the three following reasons.
6 First, the subpoena was not properly served, which the State acknowledged in its
7 Response, so 14 days after proper service of the subpoena still has not passed. Second,
8 the time for compliance has changed from the date noted in the original subpoena, and
9 the State did not issue a "drop dead" date for compliance, so the date of compliance
10 has not passed. Finally, the subpoena wasn't properly issued under A.R.S. § 13-
11 4071(B)(2), and the State doesn't have power to issue such an order, so any timing
12 issues are moot, since the subpoena is not a binding order.
13
14

15 **D. The Cases that the State Cites to Assert Personal Jurisdiction over**
16 **James DeMocker Apply to Defendants, not to Witnesses.**

17 The State cites several civil cases to show that DeMocker might be subject to
18 personal jurisdiction in Arizona. However, every one of the cases that the State cites
19 addresses jurisdiction over a defendant in a civil case. *Batton v. Tennessee Farmers*
20 *Mut. Ins. Co.*, 153 Ariz. 268, 269-270, 736 P.2d 2, 3 - 4 (1987) (Defendant, Tennessee
21 Farmers, had no offices or agents in Arizona, was not licensed to do business in
22 Arizona, and has never investigated, adjusted, settled, or defended a claim in
23 Arizona.); *A. Uberti and C. v. Leonardo*, 181 Ariz. 565, 566, 892 P.2d 1354, 1355
24 (Ariz. 1995) (Two-year-old Corrina Cordova died in a 1991 handgun accident in
25 Tucson. Her parents sued A. Uberti and C., an Italian firearms manufacturer, claiming
26

1 it manufactured and distributed a defective and unreasonably dangerous revolver that
2 caused the accident. Defendant moved to dismiss the complaint for lack of in
3 personam jurisdiction in Arizona courts). Not one of the cited cases addresses
4 personal jurisdiction over a witness.
5

6 The State also cites DeMocker's personal contacts with Arizona on Page 3 of
7 its Response. Those personal contacts might be sufficient for a court to assert personal
8 jurisdiction over a defendant in a civil case, but neither of the cases that the State has
9 cites address whether those contacts are sufficient to order a witness to produce
10 documents for a County Attorney's investigation.
11

12 **II. CONCLUSION**

13 James DeMocker, without submitting to this Court's jurisdiction over him and
14 without waiving the argument that the invalid subpoena was not properly served,
15 submits that the subpoena in this matter is not valid, has not been properly served, is
16 overbroad, and imposes an undue burden upon him. The subpoena should thereby be
17 quashed.
18

19
20 DATED this 18 day of January, 2012.

21 **ASPEY, WATKINS & DIESEL, P.L.L.C.**

22
23 By 

24 Bruce S. Griffen
25 Attorneys for Defendant
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3 COPY of the foregoing emailed
4 this 9 day of January, 2012, to:

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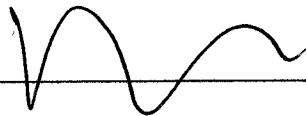
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